A

Tan Poh Khiang v Malayan Banking Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1562–07 OF 2012
MOHD HISHAMUDIN, ZAKARIA SAM AND UMI KALTHUM JJCA
24 SEPTEMBER 2014

C *Banking — Banks and banking business — Guarantees — Overdraft loan facility secured by charge on 13 pieces of land and letter of guarantee and indemnity — Borrower defaulted in repayment — Bank recalled loan facility — Borrower made settlement proposal to bank which bank accepted — Five out of nine guarantees discharged except second respondent — 13 pieces of land discharged*
D *— Bank claimed against second respondent as guarantor who were not purportedly discharged under settlement — Whether second defendant had been discharged from liability upon acceptance of borrower's settlement proposal by bank — Whether second defendant discharged from liability when bank had accepted lesser sum from borrower and had discharged all 13 landed properties*

E

In November 1995, Novel Villa Sdn Bhd ('Novel Villa') took an overdraft loan facility of RM1.8m from the respondent ('the plaintiff') which was secured by a charge on 13 pieces of land and a letter of guarantee and indemnity ('the guarantee') given by nine guarantors, including the appellant ('the second
F defendant'). When Novel Villa defaulted on its repayment obligations with the plaintiff under the overdraft loan facility, the latter recalled the loan facility. Novel Villa made a settlement proposal to the plaintiff where a sum of RM1.3m was proposed as settlement of the outstanding overdraft amount. The plaintiff accepted Novel Villa's proposal vide letter dated 16 May 2003 and
G had also agreed to discharge five out of the nine guarantors (not including the second defendant). It was not disputed that the settlement was concluded with the payment of RM1.3m by Novel Villa to the plaintiff and the security properties comprising the 13 pieces of land were accordingly discharged. Notwithstanding the said settlement, the plaintiff claimed against the second
H defendant and three other guarantors for an alleged 'shortfall' of debt due from Novel Villa to the plaintiff, being the guarantors who were not purportedly discharged under the said settlement. This appeal concerned the second defendant only as a guarantor. The judicial commissioner ('the JC') held that by accepting Novel Villa's offer of settlement, and releasing the charged
I properties, the plaintiff as the creditor had not discharged Novel Villa's entire liability under its contract with the plaintiff. There was, thus, no unilateral variation of the terms of the contract for s 86 of the Contracts Act 1950 ('the Act') to apply to discharge the second defendant of his liability as guarantor. Further, the guarantee was so worded that it made the liability of the guarantors

primary and co-extensive with that of the principal debtor. As there was no record of the second defendant having been discharged as a guarantor as compared to several other guarantors under the plaintiff's letter of acceptance of Novel Villa's offer of settlement, the JC held that the plaintiff had a valid cause of action against the second defendant under the terms of the guarantee for the balance sum due and owing by Novel Villa under the overdraft loan facility. The second defendant was therefore held to be liable for the balance due as pleaded and judgment was entered for the plaintiff. In this appeal, the second defendant raised the issues of whether the second defendant had been discharged from his liability upon the acceptance of Novel Villa's settlement proposal by the plaintiff; and whether the second defendant was discharged from his liability when the plaintiff had accepted the lesser sum of RM1.3m from Novel Villa and had discharged all 13 landed properties.

Held, allowing the appeal with costs of RM20,000:

(1) By the two letters, Novel Villa had explicitly stated that it offered to settle the outstanding overdraft and amount to a maximum limit of RM1.3m in one payment. This offer was accepted by the plaintiff vide letter dated 16 May 2003. The 'discharge of the property' meant that all 13 pieces of charged lands to the plaintiff were to be discharged. What this meant was that Novel Villa had been released from its debt claimed by the plaintiff (see para 21).

(2) Sections 87–88 of the Act applied to this case to release the second defendant, as a guarantor, from the guarantee. The JC had erred in law and on the facts when he failed to take into account the concluded settlement of Novel Villa's debt to the plaintiff and that by virtue of s 87 the second defendant was released from the guarantee (see para 22).

(3) The court did not accept the plaintiff's argument that the plaintiff's letter of acceptance dated 16 May 2003 was not meant to be a full and final settlement of the debt seeing that the plaintiff had not reserved its rights to pursue the balance of the debt due in the same letter, and had on top of accepting the offer of settlement of RM1.3m, had agreed to discharge the 13 charged lands. The plaintiff's letter dated 12 July 2003 could not be interpreted to mean that the plaintiff had reserved its right to sue Novel Villa and the guarantors for the balance of the debt due (see para 23).

(4) The second defendant was discharged from liability under the guarantee upon the plaintiff's acceptance of the settlement proposal and the release of the 13 pieces of the charged lands under ss 87–88 of the Act without the consent of the second defendant. By releasing the 13 pieces of charged lands without the consent of the second defendant under the plaintiff's letter dated 16 May 2003, the plaintiff had acted in a way which was

inconsistent with the right of the second defendant as a guarantor. Therefore, he was also discharged as a guarantor under s 92 of the Act (see paras 25–26).

[Bahasa Malaysia summary

Pada November 1995, Novel Villa Sdn Bhd ('Novel Villa') telah mengambil kemudahan pinjaman overdraf sejumlah RM1.8 juta daripada responden ('plaintif') yang telah dijamin dengan gadaian ke atas 13 keping tanah dan surat jaminan dan indemniti ('jaminan tersebut') telah diberikan oleh sembilan penjamin, termasuk perayu ('defendan kedua'). Apabila Novel Villa gagal dalam tanggungjawab bayaran baliknya dengan plaintif di bawah kemudahan pinjaman overdraf, plaintif telah menarik balik kemudahan pinjaman itu. Novel Villa telah membuat cadangan penyelesaian kepada plaintif di mana sejumlah RM1.3 juta telah dicadangkan sebagai penyelesaian baki jumlah overdraf. Plaintif telah menerima cadangan Novel Villa melalui surat bertarikh 16 Mei 2003 dan juga telah bersetuju untuk melepaskan lima daripada sembilan penjamin (tidak termasuk defendan kedua). Adalah tidak dipertikaikan bahawa penyelesaian itu telah diakhiri dengan bayaran RM1.3 juta oleh Novel Villa kepada plaintif dan jaminan hartanah yang terdiri daripada 13 keping tanah telah dilepaskan sewajarnya. Walaupun terdapat penyelesaian tersebut, plaintif menuntut terhadap defendan kedua dan tiga penjamin lain untuk dakwaan 'shortfall' hutang yang kena dibayar oleh Novel Villa kepada plaintif, yang merupakan penjamin-penjamin yang tidak bermaksud dilepaskan di bawah penyelesaian tersebut. Rayuan ini berkenaan defendan kedua hanya sebagai penjamin. Pesuruhjaya kehakiman ('PK') memutuskan bahawa dengan menerima tawaran penyelesaian Novel Villa, dan melepaskan hartanah yang dicagarkan itu, plaintif sebagai pemiutang tidak melepaskan keseluruhan liabiliti di bawah kontraknya dengan plaintif. Oleh itu, tidak terdapat pengubahan unilateral tentang syarat-syarat kontrak kerana s 86 Akta Kontrak 1950 ('Akta tersebut') yang terpakai untuk melepaskan defendan kedua daripada liabilitinya sebagai penjamin. Selanjutnya, jaminan tersebut telah disusun ayatnya sehingga menjadikannya liabiliti kepada penjamin-penjamin utama dan wujud bersama dengan penghutang utama. Oleh kerana tiada rekod defendan kedua yang dilepaskan sebagai penjamin jika dibandingkan dengan beberapa penjamin lain di bawah surat penerimaan plaintif terhadap tawaran penyelesaian Novel Villa, PK tersebut telah memutuskan bahawa plaintif mempunyai kausa tindakan sah terhadap defendan kedua di bawah syarat-syarat jaminan tersebut untuk baki jumlah yang kena dibayar dan terhutang oleh Novel Villa di bawah kemudahan pinjaman overdraf. Defendan kedua dengan itu diputuskan bertanggungjawab untuk baki yang kena dibayar sebagaimana dipli dan penghakiman telah dimasuki untuk plaintif. Dalam rayuan ini, defendan kedua telah menimbulkan isu-isu sama ada defendan kedua telah dilepaskan daripada liabilitinya setelah penerimaan cadangan penyelesaian Novel Villa oleh plaintif; dan sama ada defendan kedua telah dilepaskan daripada liabiliti

apabila plaintif telah menerima jumlah lebih kecil RM1.3 juta daripada Novel Villa dan telah melepaskan kesemua 13 hartanah.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000:

(1) Melalui dua surat itu, Novel Villa dengan jelas menyatakan bahawa ia menawarkan untuk menyelesaikan overdraf yang tertunggak dan jumlah sehingga had maksimum RM1.3 juta dalam satu pembayaran. Tawaran ini telah diterima oleh plaintif melalui surat bertarikh 16 Mei 2003. 'Discharge of the property' bermaksud kesemua 13 keping tanah yang dicagarkan kepada plaintif hendaklah dilepaskan. Ini bermaksud bahawa Novel Villa telah pun dilepaskan daripada hutangnya yang dituntut oleh plaintif (lihat perenggan 21).

(2) Seksyen-seksyen 87 dan 88 terpakai dalam kes ini untuk melepaskan defendan kedua, sebagai penjamin, daripada jaminan tersebut. PK telah terkhilaf dari segi undang-undang dan berdasarkan fakta apabila dia gagal mengambil kira penyelesaian terakhir hutang Novel Villa kepada plaintif dan bahawa menurut s 87 defendan kedua telah dilepaskan daripada jamian tersebut (lihat perenggan 22).

(3) Mahkamah tidak menerima hujah plaintif bahawa surat penerimaan plaintif bertarikh 16 Mac 2003 tidak dimaksudkan sebagai penyelesaian hutang yang penuh dan muktamad oleh kerana plaintif tidak merizab haknya untuk meneruskan dengan baki hutang yang kena dibayar dalam surat yang sama, dan selain daripada menerima tawaran penyelesaian RM1.3 juta itu, telah bersetuju untuk melepaskan 13 harta yang dicagarkan itu. Surat plaintif bertarikh 12 Julai 2003 tidak boleh ditafsirkan sebagai bermaksud bahawa plaintif telah merizabkan haknya untuk menyaman Novel Villa dan penjamin-penjamin tersebut untuk baki hutang yang kena dibayar (lihat perenggan 23).

(4) Defendan kedua telah dilepaskan daripada liabiliti di bawah jaminan tersebut setelah plaintif menerima cadangan penyelesaian dan melepaskan 13 keping tanah yang dicagarkan di bawah ss 87–88 Akta tersebut tanpa persetujuan defendan kedua. Dengan melepaskan tanah yang dicagarkan tanpa persetujuan defendan kedua di bawah surat plaintif bertarikh 16 Mei 2003, plaintif telah bertindak secara tidak konsisten dengan hak defendan kedua sebagai penjamin. Oleh itu, dia juga dilepaskan sebagai penjamin di bawah s 92 Akta (lihat perenggan 25–26).]

Notes

For cases on guarantee, see 1(2) *Mallal's Diget* (4th Ed, 2014 Reissue) paras 2551–2552.

Cases referred to

Azman bin Mahmood & Anor v SJ Securities Sdn Bhd [2012] 6 MLJ 1; [2012] 4 MLRA 595, FC (refd)
Lee Wah Bank Limited v Joseph Eu [1981] 1 MLJ 11, FC (refd)

Legislation referred to

Contracts Act 1950 ss 81, 86, 87, 88, 92

Appeal from: Civil Suit No MT4–22–884 of 2003 (High Court, Johor Bahru)

Yeo Chun Ming (CM Yeo & Assoc) for the appellant.
Nas Idalina bt Nasruddin (Tan & Lee) for the respondent.

Umi Kalthum JCA:

[1] This is an appeal against the decision of the learned judicial commissioner ('the JC') allowing the respondent's/plaintiff's claim against the appellant/second defendant, as guarantor for the alleged 'shortfall' in respect of the debts of the principal borrower Novel Villa Sdn Bhd ('Novel Villa'). For ease of reference we will refer the parties as they were referred to in the High Court suit.

THE FACTS

[2] Around November 1995, Novel Villa, the principal borrower, took an overdraft loan facility of RM1.8m from the plaintiff.

[3] The said overdraft loan facility was secured by a charge dated 18 December 1995 ('the charge') on 13 pieces of land and a letter of guarantee and indemnity dated 28 November 1995 ('the guarantee') given by nine guarantors, including the second defendant.

[4] In July 2001, Novel Villa defaulted on its repayment obligations with the plaintiff under the overdraft loan facility. The plaintiff proceeded to recall the loan facility.

[5] Novel Villa made a settlement proposal to the plaintiff vide letter dated 9 April 2003 (p 332, AR *Jld* 2) whereby it proposed a sum of RM1.3m as settlement of the outstanding overdraft amount. The plaintiff accepted Novel Villa's proposal vide letter dated 16 May 2003 (p 333, AR *Jld* 2) and had also agreed to discharge five out of the nine guarantors (not including the second defendant).

[6] It was not disputed, and in fact had been confirmed by the plaintiff's main witness 'PW1', the bank officer in charge of the said overdraft loan facility, that the settlement was concluded with the payment of RM1.3m by Novel Villa to the plaintiff and the security properties comprising the 13 pieces of land were accordingly discharged.

[7] Notwithstanding the said settlement, the plaintiff in this suit claimed against the second defendant and three other guarantors for an alleged 'shortfall' of debt due from Novel Villa to the plaintiff, being the guarantors who were not purportedly discharged under the said settlement. This appeal concerned the second defendant only as a guarantor (judgment in default had been entered against the first, third and fourth defendants who did not contest the plaintiff's action).

BEFORE THE HIGH COURT

[8] After a full hearing, the learned JC held that by accepting Novel Villa's offer of settlement, and thereby releasing the charged properties, the plaintiff as the creditor had not discharged Novel Villa's entire liability under its contract with the plaintiff. There was, thus, no unilateral variation of the terms of the contract for s 86 of the Contracts Act 1950 ('the Contracts Act') to apply to discharge the second defendant of his liability as guarantor. Further, the guarantee was so worded that it made the liability of the guarantors primary and co-extensive with that of the principal debtor. As there was no record of the second defendant having been discharged as a guarantor as compared to several other guarantors under the plaintiff's letter of acceptance of Novel Villa's offer of settlement, the learned JC held that the plaintiff had a valid cause of action against the second defendant under the terms of the guarantee for the balance sum due and owing by Novel Villa under the overdraft loan facility. The second defendant was therefore held to be liable for the balance due as pleaded and judgment was entered for the plaintiff.

THE APPEAL

[9] Before us, the second defendant raised two issues, they were:

(a) whether the second defendant as guarantor had been discharged from his liability upon the acceptance of Novel Villa's settlement proposal by the plaintiff; and

(b) whether the second defendant as guarantor was discharged from his liability when the plaintiff had accepted the lesser sum of RM1.3m from Novel Villa and had discharged all 13 landed properties.

We will consider these two issues together.

Whether the second defendant discharged from liability upon the plaintiff's acceptance of settlement proposal and the discharge of 13 landed properties

[10] It was the second defendant's submission that in view of the acceptance by the plaintiff of the settlement proposal by Novel Villa, the principal borrower, and the due payment of the agreed sum of RM1.3m by Novel Villa to the plaintiff, the second defendant, as a guarantor, was clearly discharged from the guarantee by virtue of s 87 of the Contracts Act which provides as follows:

> 87 Discharge of surety by release or discharge of principal debtor
>
> The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

[11] As such, the learned JC had erred in law and on the facts when he failed to take into account that Novel Villa, the principal borrower, had reached an agreement/settlement with the plaintiff, which was perfected in respect of the outstanding overdraft amount as reflected:

(a) in the offer letter dated 9 April 2003 from Novel Villa to the plaintiff; and

(b) in the acceptance letter dated 16 May 2003.

[12] By these two said letters, Novel Villa had been released from the debt claimed by the plaintiff and as confirmed by the plaintiff's only witness PW1, Mr Jagir Singh a/l Ajmer Singh. Therefore, the second defendant as guarantor as of right was released from the guarantee by virtue of ss 81 and 87 of the Contracts Act.

[13] It was also submitted that the learned JC had erred in law and on the facts when he took into account and failed to make the correct interpretation of subsequent non-contemporaneous letter dated 12 July 2003 (p 335, AR *Jld* 2) from the plaintiff to Novel Villa. The plaintiff's witness PW1, during cross-examination, had explained the contents of the fourth paragraph of the said letter, wherein it was stated as follows:

> NOTWITHSTANDING the above, the Bank reserves the right to demand or request additional monies if the amount received in relation to the redemption statement is insufficient *to settle all sums due and owing to us* and/or should there be any variation in the interest rate chargeable, it will be adjusted accordingly. (Emphasis added.)

to mean that the term 'to settle all sums due and owing to us' referred to the earlier settlement sum of RM1.3m and not any alleged 'shortfall' arising thereafter (see p 64, AR *Jld* 1).

[14] Moreover, the fact that Novel Villa, the principal borrower, was not sued or even made a party to the present suit for the alleged 'shortfall' clearly confirmed the settlement reached between Novel Villa and the plaintiff, and that Novel Villa would not be sued by the plaintiff for the 'shortfall' now claimed against the second defendant. This fact was confirmed by PW1 during cross-examination where at p 63, AR *Jld* 1, he stated as follows:

29.Q: Dalam tuntutan ini juga tiada tuntutan terhadap peminjam utama, Novel Villa Sdn Bhd, setuju?

A: Setuju.

30.Q: Rujuk Encik Jagir Singh semula pada mukasurat 173, Bundle B. Encik Jagir Singh, setuju bahawa tiada tuntutan dibuat terhadap peminjam utama, Novel Villa Sdn Bhd kerana penyelesaian ini telah dicapai di antara Plaintif dan Novel Villa Sdn Bhd, setuju?

A: Setuju.

31.Q: Dan Encik Jagir Singh, penyelesaian di mukasurat 173 diantara Plaintif dan Novel Villa Sdn Bhd adalah berdasarkan kepada surat tawaran di mukasurat 172, setuju?

A: Ya, setuju.

32.Q: Tawaran tersebut adalah RM1.3 juta, betul?

A: Betul.

[15] In view of the aforesaid position of the plaintiff, the second defendant, as a guarantor, was also clearly discharged from the guarantee, consonant with the provisions of s 88 of the Contracts Act which provides as follows:

> 88 Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor
>
> A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

The second defendant, as a guarantor, had never agreed to the release of Novel Villa from its obligations to the plaintiff.

[16] The second defendant drew the attention of the court to a subsequent judgment in default of appearance ('the default judgment') 24 December 2008 entered against Novel Villa under a separate and subsequent Civil Suit No 22–712 of 2008 at the High Court in Johor Bahru. It was noted that:

(a) in this present suit, wherein Novel Villa was not made a party, it was filed on 24 December 2003. The subsequent suit against Novel Villa, wherein the default judgment was entered against Novel Villa as the

principal borrower, was only filed on 26 September 2008, after the second defendant's defences herein was brought up by the second defendant; and

(b) the subsequent suit against Novel Villa was filed more than seven years after the aforesaid overdraft loan facility was defaulted by Novel Villa and was recalled in 2001, rendering the subsequent action itself against Novel Villa time barred.

[17] It was, therefore, submitted that the default judgment entered against Novel Villa under the separate and subsequent Civil Suit No 22–712 of 2008, followed by an order for winding up by the court dated 12 May 2010 (pp 323–325, AR *Jld* 2), was clearly an abuse of the process of the court and an afterthought attempt to subsequently 'defeat' the second defendant's valid defences.

[18] As such, the learned JC had erred in law and on the facts when he failed to take into account the second defendant's right to be released from the guarantee pursuant to the provisions of ss 86 and 88 of the Contracts Act based on the true position of Novel Villa at all material times.

[19] For the plaintiff/respondent, it was argued that vide the acceptance letter dated 16 May 2003, the plaintiff had only accepted the proposal to settle the matter by Novel Villa paying to the plaintiff RM1.3m and had agreed to discharge the charge on the 13 pieces of land. That nothing was stated that the acceptance was in full and final settlement of the overdraft loan facility. Further, the plaintiff had also agreed to release five out of nine 'paying guarantors' which did not include the second defendant. This fact (being not in full and final settlement) was further reiterated in the plaintiff's letter dated 12 July 2003 (p 335, AR *Jld* 2) wherein the plaintiff had stressed that it had the right to claim outstanding moneys if the redemption sum was insufficient to settle the outstanding sum owed. Great stress was laid on the statement in para 4 of the said letter (as quoted in para 13 above) to evince the intention of the plaintiff to claim further sums outstanding. This intention to claim further sums outstanding against Novel Villa was proved when the default judgment for the balance of the debt due in the sum of RM1,331,274.36 as of 31 July 2008 with interest thereafter was entered against Novel Villa, and Novel Villa was wound up on 12 May 2010.

[20] We had perused the two material letters dated 9 April 2003 ('the offer letter') and 16 May 2003 ('the acceptance letter'). To better understand the import of these two letters, we reproduce them in toto as follows:

NOVEL VILLA SDN BHD (348471-U)

C/o. 32A, Jalan Pahlawan 2, Taman Ungku Tun Aminah

81300 Skudai, Johor Bahru.

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09 April 2003

Attn : Mr. Jagir Singh

The Loan Supervising Officer

MALAYAN BANKING BERHAD

Loan Management Centre

6th Floor, No. 11, Jalan Selat Tebrau

80000 Johor Bahru

Johor Darul Ta'zim

Dear Sir

OVERDRAFT ACCOUNT NO. 5-01150-10627-6 (Ex-Pacific Bank)

With reference to the above.

We hereby proposed to settle the outstanding overdraft amount with a maximum limit of RM1.3 million with your bank in one payment.

For your understanding, we are really unable to settle the entire amount owing with your bank in this economic crisis.

We hope you will kindly accept our proposal.

We apologise for any inconvenience cause and your early reply would be very much appreciated.

Yours faithfully

NOVEL VILLA SDN.BHD. (348471-U)

sigd

LIM CHIN HOE

(director)

MAYBANK

PRIVATE &CONFIDENTIAL

OurRef : LMC/OAR/JS/rin/03/0447/OD106276/PN

Date : 16hb Mei 2003

WITHOUT PREJUDICE

M/s Novel Villa Sdn Bhd

c/o 32A, Jalan Pahlawan 2

Taman Ungku Tun Aminah

81300 Skudai

Johor

Attn : Mr Lim Chin Hoe

Dear Sir/Madam

Re : SETTLEMENT PROPOSAL

A/C NO. 501150–106276

The above and your letter dated 09/04/2003 refer.

We are pleased to advised that our management has accepted your above proposal of RM1.3 million and to discharge the property charged to us subject to the following conditions :-

- Payment is to be received within 2 month from date of our notification hereof.
- To discharge the following paying Guarantors :-
  a. Lim Chin Hoe
  b. Siow Ah Seng
  c. Joseph Ee Yew Chong
  d. Keh Ah Kau @ Ker Hoon Chit
  e. Steven Ee Chiung Sun
- A copy of the Sale & Purchase agreement is to be forward to us within 2 weeks hereof.

Thank You.

Yours faithfully

For Maybank

'SERVICE IS OUR BUSINESS'

sigd

JAGIR SINGH

Authorised Signatory

Loan Management Centre

Johore

07-2252176 / fax : 07-2248895

cc. M/s Tan & Lee

Advocates & Solicitors

(Ref: TLA/MBBM/Lt4(155)/0112/698/cn

[Please kept the matter in abeyance]

Malayan Banking Berhad

(3813-K)

[21] By the two letters, it was clear to us, and we accepted the submission of the second defendant, that Novel Villa had explicitly stated that it offered to settle the outstanding overdraft and amount to a maximum limit of RM1.3m in one payment. This offer was accepted by the plaintiff vide letter dated 16 May 2003. The plaintiff went further to state that it would 'discharge the property charged to us' subject to the conditions that:

(a) 'payment is to be received within 2 months from date of our notification hereof';

(b) 'to discharge the following [5] paying Guarantors'; and

(c) 'A copy of the Sale And Purchase agreement is to be forwarded to us within 2 weeks hereof)'.

The 'discharge of the property' meant that all 13 pieces of charged lands to the plaintiff were to be discharged. What this meant was that Novel Villa had been released form its debt claimed by the plaintiff. This state of affairs was confirmed by the plaintiff's sole witness PW1. PW1 stated as follows at pp 59–61, AR *Jld* 1:

7.Q: Encik Jagir Singh, boleh saya rujuk kepada mukasurat 173, Bundle B. Ini merupakan surat penyelesaian bertarikh 16/5/2003, betul?

A: Betul.

8.Q: Encik Jagir Singh, pada masa surat ini dikeluarkan, berapakah jumlah yang dihutang oleh Novel Villa Sdn Bhd kepada Plaintif? Novel Villa merupakan peminjam utama.

A: About RM1.778 million.

9.Q: Boleh saya rujuk Encik Jagir Singh kepada mukasurat 17 dan 18, Bundle B. Is this a charge or gadaian?

A: Yes.

10.Q: Encik Jagir Singh, I am going to read the part of the charge for you, daripada pertengahan. It says: 'NOVEL VILLA SDN BHD, sebuah syarikat yang ditubuhkan di Malaysia dan mempunyai pejabat berdartarnya di No. 26A, Jalan Shah Bandar 6, Taman Ungku Tun Aminah, 81300 Skudai, Johor Bahru, Johor.'

A: That's right. Correct.

11.Q: And here is says: 'tuanpunya tanah atas tanah yang tersebut dalam jadual di bawah ini', correct?

A: Yes, correct.

12.Q: And here also says: 'bagi maksud penjamin, pembayaran kepada pemegang gadaian yang tersebut namanya di bawah ini, berserta

faedah, wang yang dari semasa ke semasa kena dibayar kepadanya daripada akaun semasa saya/akaun yang berikut yang disimpan di antara kami.' Correct?

A: Yes, correct.

13.Q: And go the next page (on top), it says: 'Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu beserta faedah atasnya mengikut peruntukan-peruntukan yang dilampirkan disini' correct?

A: Yes, correct

14.Q: So, Encik Jagir Singh, do you agree to this particular charge, 13 tanah ini telah digadai untuk menjamin pembayaran balik hutang Novel Villa Sdn Bhd, betul?

A: That's right, correct.

Yang Arif: Gadaian ini untuk?

2nd Defendant's counsel: Menjamin pembayaran balik hutang Novel Villa Sdn Bhd.

15.Q: Encik Jagir Singh, saya rujuk kepada mukasurat 173 lagi. Atas jawapan anda awal tadi, adakah benar bahawa 13 tanah ini telah digadai kepada pihak Plaintif untuk menjamin jumlah RM1.778 juta yang dihutang oleh Novel Villa Sdn Bhd? Is that correct?

A: It is correct.

Yang Arif: Jumlah hutang berapa?

2nd Defendant's Counsel: RM1.778 juta

16: Daripada surat ini, pihak Plaintif telah menerima proposal RM1.3 juta, betul?

A: That's correct.

Yang Arif: RM1.3? Setuju terima sebagai penyelesaian?

2nd Defendant's counsel: RM1.3 million. Yes.

17.Q: Adakah Encik Jagir Singh setuju sekiranya Plaintif menerima jumlah yang kurang daripada RM1.778 juta yang dihutang sebagai redemption sum untuk melepaskan 13 tanah tersebut daripada gadaian, 13 tanah tersebut tidak boleh lagi bertindak sebagai jaminan bagi bayaran baki jumlah tersebut, betul?

A: Ya, betul. Telah dilepaskan.

18.Q: Adakah Encik Jagir Singh setuju bahawa 13 tanah tersebut tidak lagi menjamin jumlah yang kini dituntut oleh pihak Plaintif terhadap Defendan Ke-2?

A: Ya, betul.

[22] As such, we were of the view that ss 87 and 88 of the Contracts Act applied to this case to release the second defendant, as a guarantor, from the guarantee. We, therefore, found that the learned JC had erred in law and on the facts when he failed to take into account the concluded settlement of Novel Villa's debt to the plaintiff and as confirmed by PW1, and that by virtue of s 87 the second defendant was released from the guarantee.

[23] We did not accept the plaintiff's argument that the plaintiff's letter of acceptance dated 16 May 2003 was not meant to be a full and final settlement of the debt seeing that the plaintiff had nor reserved its rights to pursue the balance of the debt due in the same letter, and had on top of accepting the offer of settlement of RM1.3m, had agreed to discharge the 13 charged lands. We accepted the submission of the second defendant when he explained the meaning of para 4 of the plaintiff's letter dated 12 July 2003 as being the true meaning of the said paragraph (see para 13 above) and that it could not be interpreted to mean, as did the learned JC in error, the plaintiff had reserved its right to sue Novel Villa and the guarantors for the balance of the debt due.

[24] We agreed with the second defendant's submission that it was very significant for the plaintiff to sue the first to the fourth defendants and not Novel Villa in this action in 2003, for it showed the true state of affairs between Novel Villa and the plaintiff. We also agreed with the second defendant that the fact the plaintiff had sued Novel Villa in Civil Suit No 22–712 of 2008, was an after thought to defeat the second defendant's defence in the circumstances of this case and to bolster the plaintiff's argument in this case. We were not impressed, to say the least, with the plaintiff's argument pertaining to this aspect. The said civil suit to our minds seemed to be instituted to self-serve the plaintiff's case against the second defendant in this suit.

[25] We therefore found that the second defendant was discharged from liability under the guarantee upon the plaintiff's acceptance of the settlement proposal and the release of the 13 pieces of charged lands under the provisions of ss 87–88 of the Contracts Act without the consent of the second defendant (see *Lee Wah Bank Limited v Joseph Eu* [1981] 1 MLJ 11 at paras C–D, right).

[26] We also found that by releasing the 13 pieces of charged lands without the consent of the second defendant under the plaintiff's letter dated 16 May 2003, which were charged to the plaintiff to guarantee the full payment of Novel Villa's debts to the plaintiff, the plaintiff had acted in a way which was inconsistent with the right of the second defendant, as a guarantor. We therefore agreed with the submission of the second defendant that he was also discharged as a guarantor under the provisions of s 92 of the Contracts Act which provides as follows:

> 92 Discharge of surety by creditor's actor or omission impairing surety's eventual remedy
>
> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

[27] In short, we found that there was a full and final settlement of the debt due from Novel Villa to the plaintiff which in law discharged the second defendant as a guarantor. In making this finding, we were very well aware of the principles of law pertaining to appellate jurisdiction of this court. We do not wish to cite case authorities on this issue other than to quote a passage from the Federal Court case of *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1; [2012] 4 MLRA 595, wherein Raus Sharif PCA at p 12 (MLJ); p 603 (CLJ) para 23 stated as follows:

> [23] The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Multar Masngud v Lim Kim Chet and Anor* [1982] 1 MLJ 184, wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe and Ors* [1984] 2 MLJ 165 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not property analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice. In *Gan Yook Chin and Anor v Lee Ing Chin And Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, the Federal Court echoed the following:
>
> > In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.
>
> Clearly, the phrase ... 'insufficient judicial appreciation of evidence' merely relate to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

CONCLUSION

[28] For the reasons stated above, we had unanimously allowed the appeal with costs of RM20,000 here and below to the second defendant/appellant. The order of the High Court was set aside. Deposit was refunded to the appellant.

Appeal allowed with costs of RM20,000.

Reported by Afiq Mohamad Noor